IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-368

CHARLES B. MARKHAM, *Petitioner*

v.

JAMES B. SWAILS, Chairman, and HORACE E. STACY, JR., EMERSON P. DAMERON, ROBERT C. HOWISON, JR., W. H. MCELWEE, GEORGE H. MCNEILL, FRANCIS I. PARKER, WALTER R. MCGUIRE, and ERIC C. MICHAUX, all members of the BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, and the BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME~~ COURT OF NORTH CAROLINA

CHARLES B. MARKHAM,
Petitioner,
Pro se.

Residence:
204 North Dillard Street
Durham, North Carolina 27701

Commercial Printing Co., Raleigh, N. C.

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[1] The Superior Court's hearing on the Rule 52(b) was held June 18, 1975 and its decision was announced on that date. The resulting order was signed June 27, 1975.

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[2] While the opinion of the Court of Appeals of North Carolina was filed April 21, 1976, the Court's mandate was issued to the Superior Court of Wake County on May 3, 1976. The latter date, under Rule 14(a) of the North Carolina Rules of Appellate Procedure (Appendix B, *infra*, p. 14a) is the beginning of the period within which notice of appeal must be served and filed.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles B. Markham, the petitioner herein, prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of North Carolina entered in the above-entitled case on June 17, 1976, dismissing *ex mero motu* petitioner's appeal as of right from the judgment of the North Carolina Court of Appeals entered April 21, 1976. p. 332

OPINIONS AND ORDERS BELOW

The Board of Law Examiners of the State of North Caroline issued no formal ruling in petitioner's case; its letter of March 7, 1973 advising him of its decision is found in Appendix C, *infra,* p. 21a. The order of the Honorable Henry A. McKinnon, Jr., of February 14, 1975 in the Superior Court of Wake County, directed that a writ of *certiorari* issue, and is found in Appendix C, *infra,* p. 22a. The decision and order of Judge McKinnon of March 20, 1975, in the Superior Court of Wake County, affirming the Board's decision, is not reported, and is found in Appendix C, *infra,* p. 23a. The order of Judge McKinnon, dated June 27, 1975, denying petitioner's motion to amend, etc. under Rule 52 (b) of the North Carolina Rules of Civil Procedure, is not reported, and is found in Appendix C, *infra,* p. 25a. The opinion and judgment of the North Carolina Court of Appeals holding that it had no jurisdiction to hear petitioner's appeal is reported as *Markham v. Swails,* 29 N.C. App. 205, ___ S.E. 2d ___ (1976), and is printed in Appendix A, *infra,* p. 1a. The judgment of the Supreme Court of North Carolina, entered June 17, 1976, dismissing petitioner's appeal *ex mero motu,* and its order denying petitioner's petition for discretionary review, is not yet reported and is found in Appendix C, *infra,* p. 33a. The order of the Supreme Court of North Carolina, dated July 14, 1976, denying petitioner's alternative petition under Rule 21 of the North Carolina Rules of Appellate Procedure for a writ of *certiorari,* filed simultaneously with his notice of appeal and petition for discretionary review under Rules 14 and 15, is not yet reported, and is found in Appendix C, *infra,* p. 34a.

JURISDICTION

The judgment of the Supreme Court of North Carolina for which review is sought here was entered June 17, 1976. (There was no petition for or order respecting rehearing, nor was any extension of time sought or granted within

which to petition for *certiorari;* the *certiorari* petition described above was filed simultaneously with and in the alternative to the other pleadings on which decision was rendered June 17, 1976.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Was petitioner's appeal as of right properly dismissed *ex mero motu* by the Supreme Court of North Carolina when constitutional issues as specified by Section 7A-30 of the General Statutes were timely raised and directly involved?

2. By reliance on procedural technicalities having no basis in state law, may the North Carolina Court of Appeals (and the Supreme Court of North Carolina, which dismissed petitioner's appeal therefrom) deprive petitioner, an unsuccessful applicant for admission to the Bar of North Carolina by comity, of substantive judicial review of adverse decisions of the State Board of Law Examiners and the Superior Court of Wake County interpreting the Board's Rule VII, 1, (5)b, i, which decisions were timely alleged to have violated petitioner's rights under the "due process" clause of the Fourteenth Amendment to the Constitution of the United States?

3. Was it arbitrary, capricious and unreasonable conduct, and an abuse of discretion in violation of the petitioner's rights under the "due process" clause of the Fourteenth Amendment, for the Board of Law Examiners (and the three state courts in which review of its decision was sought) to deny petitioner's comity application for failure to establish under Board Rule VII, 1, (5)b, i that, for the requisite time period, he had been "actively and substantially engaged in the practice of law as defined by G.S. 84-2.1" where

> (a) Neither the Board of Law Examiners nor the Superior Court of Wake County made any findings of fact to support their conclusion that petitioner had not so satisfied the Board's rule?

(b) There was no competent evidence of record to support the said conclusion?

(c) The uncontradicted evidence adduced by petitioner and by the respondent Board itself clearly and convincingly established that petitioner had been "actively and substantially engaged in the practice of law," as that phrase was defined in the Board's Rule, in the General Statutes of North Carolina, and in interpretations of the General Statutes by the Supreme Court of North Carolina?

(d) Petitioner, whose "practice of law" had substantially involved the interpretation and enforcement of federal civil rights laws, was subjected to pointless harassment by the Board's Chairman at his hearing before it?

4. Was it a violation of petitioner's rights under the "due process" clause of the Fourteenth Amendment, for the Board of Law Examiners and the three state courts in which review of its decision on this ground was sought, to refuse at all times to pass upon petitioner's eligibility for comity under the Board's Rule VII, 1, (5)b, ii, authorizing admission of persons who, for the requisite time period, were "actively and substantially engaged . . . in . . . activities which would constitute the practice of law if done for the general public?"

5. Is there any rational connection between the respondent Board's requirements and petitioner's fitness and capacity to practice law?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States is set forth in Appendix B, *infra* p. 7a.

Insofar as pertinent to this case, Rule VII of the Rules Governing Admission to the Practice of Law in North Carolina is found in 279 N.C. 735 and is set forth in Appendix B, *infra,* p. 18a.

All other statutory provisions and rules are included in the official volumes of the General Statutes of North Carolina, published by The Michie Company. Such statutes and rules are listed below, where the official volume number, page, and location in the Appendix hereto are listed.

Statute or Rule				*Appendix*
Statutes		*Volume*	*Page*	*B, Page No.*
1-269		1A, Replacement 1969	284	7a
1-277		1A, Replacement 1969, 1975 Cum. Supp.	80	7a
1-279		1A, Replacement 1969	321	8a
1-279,	as amended eff. 7-1-75	1A, Replacement 1969, 1975 Cum. Supp.	82	8a
7A-30		1B, Replacement 1969	88	10a
84-2.1		2C, Replacement 1975	310	10a
Rules				
52	Rules of Civil Procedure	1A, Replacement 1969	683	11a
3	Rules of Appellate Procedure	4A, Replacement 1970, 1975 Cum. Supp.	68	12a

14	Rules of Appellate Procedure	4A, Replacement 1970, 1975 Cum. Supp.	87	14a
16	Rules of Appellate Procedure	4A, Replacement 1970, 1975 Cum. Supp.	92	16a

STATEMENT OF THE CASE[3]

On and after August 23, 1972 and continuing at least through March 7, 1973, Rule VII of the Rules Governing Admission to the Practice of Law in the State of North Carolina provided, in parts pertinent to this proceeding, as follows (see Appendix B, *infra,* p. 18a and 279 N.C. 735, 736 for full text):

> "Section 1. Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application may be certified (licensed) by the Board to practice law in the State of North Carolina, without written examination, in the discretion of the Board, provided each such applicant shall
>
> * * *
>
> "(5) Prove to the satisfaction of the Board:
>
> "a. That the applicant is licensed to practice law in a State having comity with North Carolina.
>
> "b. That the applicant has been actively and substantially engaged for at least three (3) years out of the

[3] Record references are to the pages of the printed record presented to the North Carolina Court of Appeals.

> last five (5) years immediately preceding the filing of his application with the Secretary in:
>
> "i. The practice of law as defined by G.S. 84-2.1, or
>
> "ii. Activities which would constitute the practice of law if done for the general public . . ."

Petitioner is a native of the City and County of Durham, North Carolina; maintained his domicile there from his birth in 1926 until 1959; and is and has been again a *bona fide* citizen and resident of the City and County of Durham, North Carolina, since May 13, 1972. (R. 132-134, 147-148). He was admitted to the Bar of the District of Columbia on November 5, 1951. (R. 6, 27, 117, 129). He is also a member of the Bars of the State of New York (1961), the United States Courts of Appeal for the Second (1962) and District of Columbia (1955) Circuits and of the United States Supreme Court (1964). (R. 6, 27, 153). Petitioner was employed as a Special Attorney by the Office of Chief Counsel of the United States Internal Revenue Service from 1952 to 1960 (representing the Commissioner in the United States Tax Court from 1955 to 1960). (R. 6, 7, 27, 150). From 1960 to 1965 he was employed by two New York City law firms. (R. 6, 7, 27, 150).

From 1965 to 1972 petitioner was employed on a full-time basis by two federal government agencies, as Director of Research of the United States Equal Employment Opportunity Commission (EEOC) from mid-December, 1965 to October, 1968, and as Deputy Assistant Secretary of the United States Department of Housing and Urban Development (HUD) from July, 1969 to May, 1972. (R. 7, 27, 150, 155, 185). Both periods of service were preceded by appointments of approximately six months as consultant, during which petitioner performed substantially all the duties

of the positions to which he was later appointed. (R. 7, 27, 126, 150, 155, 185).

During his period of service at EEOC, which was established by Title VII of the Civil Rights Act of 1964 (R. 155), and to a lesser extent at HUD, petitioner was actively involved in federal civil rights law interpretation and enforcement. (R. 106, 107, 126, 155-157, 160, 161, 171-175, 179, 180, 182-184, 186).

Approximately 80 percent of petitioner's working time at EEOC between August 23, 1967 and October 9, 1968 consisted of direct involvement in the planning and preparation of evidence for EEOC hearings into the employment practices of the drug, utility, aerospace and film industries, and into "white collar" job discrimination in New York City. (R. 173). His staff was primarily responsible for the presentation of the Commission's evidence at such hearings. (R. 173). At the New York hearings, the employment practices of banks, insurance companies, and brokerage, underwriting, accounting and law firms were studied. (R. 24). The Chairman of EEOC stated at the New York City hearings: "It has been Mr. Markham's research and the creativity of his office, and of Mr. Markham specifically, that has led to these hearings. He started working on these projects about a year and a half ago, and all of us on the Commission are greatly indebted to him." (R. 23). EEOC hearings, which were a major technique in carrying out the Commission's civil rights law enforcement responsibilities (R. 172), were followed up by compliance programs in the development of which petitioner participated. (R. 172, 173).

Also at EEOC, petitioner developed, personally drafted, and prepared rulings and opinion letters interpreting, the record keeping and reporting regulations authorized by Section 709(c) of the Civil Rights Act of 1964 and appearing at Title 29, Sections 1602.7—29, Code of Federal Regulations. (R. 126, 155, 156). These regulations are applicable to thousands of employers and labor unions throughout the United States. (R. 156). Facts gathered under petitioner's supervision at EEOC were used in investigations carried out by the Commission itself, the Office of Federal Contract Compliance of the United States Department of Labor, and the Civil Rights Division of the United States Department of Justice. (R. 156, 160). Such facts have been introduced into evidence in scores of trials in U. S. District Courts where minority employment statistics were relevant. (R. 156, 160). Regulations regarding personnel testing, prepared by petitioner's staff in cooperation with the Office of General Counsel, were upheld by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). (R. 156, 160).

Another significant EEOC activity was petitioner's supervision of an investigation into the employment patterns of the Bell Telephone System, which later served as the basis for EEOC's successful intervention in the American Telephone and Telegraph Company rate case before the Federal Communications Commission. (R. 174, 183). By virtue of petitioner's position as a senior staff member of EEOC he frequently and continuously counseled Commissioners, Office of General Counsel and other senior staff executives on a wide variety of legal questions arising under Title VII. (R. 156, 160, 161). Petitioner personally drafted, reviewed and interpreted an estimated 50 data-sharing contracts between EEOC and state and local anti-discrimination agencies; and in July, 1968 he accompanied EEOC's General Counsel to a series of meetings throughout the nation wherein petitioner explained to officials of state and local agencies their contractual obligations under, and rendered advice as to the proper interpretation of, these contracts. (R. 174, 175).

At HUD, during the period between February, 1969 and May, 1972, hardly a day went by that petitioner was not using his legal background and skills, writing legal documents, commenting on legal documents, rendering legal advice

to those with whom he worked, or reviewing documents having a legal impact. (R. 177, 178, 194). For example, he prepared for Secretary Romney an extensive analysis, 30 pages long, of the legislative history of the Civil Rights Acts of 1964 and 1968. (R. 157, 193). He wrote position papers, reviewed legal opinions, and discussed with his superior some of the cases that were involved in the preparation of President Nixon's policy statement on enforcement of the Fair Housing Act and other matters related to the placement and location of low income housing. (R. 186).

Petitioner worked closely with HUD's Office of General Counsel in development of legal interpretations of the various statutes affecting HUD programs. (R. 126). He regularly reviewed, approved and executed grant contracts between HUD and state and local governments; frequently questions of legal interpretation of these agreements and the authorizing statutes arose. (R. 161, 177). He made legal determinations in the certification of "workable program" plans by which local communities became eligible for urban renewal funds. (R. 177). He reviewed and made recommendations on all investigative reports (including FBI reports) dealing with alleged violations of federal law and departmental regulations in his areas of responsibility. (R. 177). He wrote and reviewed regulations for the grant assistance programs within his jurisdiction. (R. 189, 190). He reviewed legislative proposals from other governmental departments. (R. 177). Over a period of a month, he prepared several legal memoranda relating to the powers of the New Community Development Corporation. (R. 193). He served as a principal editor and draftsman of the first draft of the President's Report to Congress on National Growth Policy, which involved reviewing and abstracting legislative proposals from other Cabinet departments. (R. 178).

On or about August 23, 1972, petitioner filed with the respondent Board's Secretary an application for admission by comity under Rule VII. (R. 4, 26, 131).

On or about March 1, 1973, petitioner filed a supplementary statement with the Board. (R. 172-178).

On March 3, 1973, petitioner appeared at the Board's request and supplied further information in response to questions propounded by the members. (R. 180-200).

Under date of March 7, 1973, petitioner was advised by letter of B. E. James, Secretary-Treasurer, that on March 3, the Board had denied his application. (R. 21, 22; see Appendix C, *infra,* p. 21a).

The grounds set forth for the said denial were that petitioner had failed to prove to the satisfaction of the Board, under Rule VII, Section 1, (5)b, "that he has actively and substantially engaged in the practice of law for three (3) out of the last five (5) years immediately preceding the filing of his application." (R. 22). The Board's letter of March 7, 1973 contained no reference to a finding under Rule VII, Section 1, (5)b, ii as to whether petitioner had been "actively and substantially engaged in activities which would constitute the practice of law if done for the general public"; it contained no findings of fact upon which the Board had based its conclusion that petitioner had failed to prove his compliance with Rule VII, Section 1, (5)b. (R. 21, 22). See Appendix C, *infra,* p. 21a.

HOW FEDERAL QUESTIONS WERE RAISED

On or about April 2, 1973 petitioner filed a petition for writ of *certiorari* under G.S. 1-269 (see Appendix B, *infra,* p. 7a) in the Superior Court of Wake County, seeking judicial review of the Board's action. (R. 1-24). In Paragraph 40 of his petition (R. 15, 16) petitioner alleged that the Board's determination of March 3, 1973 that petitioner had not actively and substantially engaged in the "practice of law" was "clearly unreasonable, arbitrary, and capricious and

constituted an oppressive and manifest abuse of discretion [which] violated the due process clause of the Fourteenth Amendment to the United States Constitution." The "due process" clause was again invoked by reference in Paragraph 42 of the petition (R. 17) with respect to the Board's failure to find that petitioner had been actively and substantially engaged in activities which "would constitute the practice of law if done for the general public."

On February 14, 1975 the Honorable Henry A. McKinnon, Jr., ordered that a writ of *certiorari* issue to bring before the Court the record of the proceedings before the Board in the matter of petitioner's application. (R. 42; see Appendix C, *infra,* p. 22a). No evidence was offered before Judge McKinnon and, as in all cases of review by *certiorari,* the Court confined itself to the record before the Board. (R. 97).

On March 20, 1975 Judge McKinnon affirmed the Board's action in denying petitioner's application; he entered no findings of fact or conclusions of law. (See Appendix C, *infra,* p. 23a; R. 42).

On April 1, 1975 petitioner filed a motion to have the Court amend its findings, make additional findings, or amend its decision and order of March 20, 1975. (R. 43-88). (The motion was timely under G.S. 1A-1, Rule 6(a) of the North Carolina Rules of Civil Procedure, since March 30, 1975 was a Sunday, and March 31, 1975 was Easter Monday, a legal holiday in the State of North Carolina). The motion was filed pursuant to G.S. 1A-1, Rule 52(b), North Carolina Rules of Civil Procedure, which reads as follows (see Appendix B, *infra,* p. 11a for full text of Rule 52):

> "(b) *Amendment.*—Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may

> be made with a motion for a new trial pursuant to Rule 59."

Among the additional findings requested was a finding that petitioner had satisfied Board Rule VII, Section 1, (5)b, ii. (R. 60, 61).

In the Requested Conclusions of Law (R. 84) which served as part of Exhibit B to petitioner's motion of April 1, 1975, petitioner again called for rulings that the Board's determination of March 3, 1973 and its failure to find that petitioner satisfied Rule VII, Section 1, (5)b, ii, "violated the due process clause of the Fourteenth Amendment to the United States Constitution." (R. 87). To Judge McKinnon's Order issued June 18, 1975 (R. 91, 92) and signed June 27, 1975 (R. 91; Appendix C, *infra,* p. 25a) denying petitioner's motion and declining to enter petitioner's Requested Findings of Fact, Conclusions of Law and Judgment, petitioner entered exceptions and appeal entries (R. 91, 92; see Appendix C, *infra,* p. 24a) which were carried forward in Assignments of Errors Nos. 2 and 3 to the North Carolina Court of Appeals (R. 200-202; see Appendix C, *infra,* p. 27a) Petitioner entered notice of appeal from Judge McKinnon's orders of March 20, 1975 and June 18, 1975 on June 24, 1975. (R. 91-94; see Appendix C, *infra,* pp. 24a, 25a, 27a).

In an opinion filed April 21, 1976 the Court of Appeals of North Carolina dismissed petitioner's appeal from the March 20, 1975 order of Judge McKinnon on the ground that it had no jurisdiction to hear the appeal; and treating it as an order of dismissal, affirmed the June 27 order of Judge McKinnon denying petitioner's motion under Rule 52(b). (The opinion of the court appears at Appendix A, *infra,* pp. 1a-6a).

On May 13, 1976 petitioner served and filed in the Supreme Court of North Carolina a notice of appeal of right from the judgment of the North Carolina Court of Appeals. (The notice of appeal appears at Appendix C, *infra,*

p. 30a). The notice of appeal was filed under G.S. 7A-30 (see Appendix B, *infra,* p. 10a) and under Rule 14 of the North Carolina Rules of Appellate Procedure (see Appendix B, *infra,* p. 14a). The notice of appeal alleged that the judgment of the Court of Appeals was rendered in a case which directly involved a substantial question arising under the Constitution of the United States; that the Board's determination of March 3, 1973 violated the due process clause of the Fourteenth Amendment to the U. S. Constitution; and finally that the decision of Court of Appeals, by denying petitioner any further judicial review of the determinations of the Board and of Judge McKinnon, represented a still further denial of due process of law under the Fourteenth Amendment. (See Appendix C, *infra,* pp. 30a-32a)[4]

On June 17, 1976 the Supreme Court of North Carolina entered a judgment dismissing petitioner's appeal *ex mero motu.* (See Appendix C, *infra,* p. 33a).

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[4] Simultaneously with his notice of appeal under G.S. 7A-30 to the Supreme Court, petitioner filed, under G.S. 7A-31 and Rule 15 of the Rules of Appellate Procedure, a petition for discretionary review of the judgment of the Court of Appeals, and, in the alternative, a petition for writ of *certiorari* as a substitute for appeal, under G.S. 1-269 and Rule 21 of the North Carolina Rules of Appellate Procedure. On June 17, 1976 the Supreme Court included in its judgment with respect to petitioner's appeal of right an order denying the petition for discretionary review, and on July 14, 1976 the Supreme Court entered an order denying the petition for writ of *certiorari.* Appeal to this Court would not lie from the Supreme Court of North Carolina's denials of the petitions for discretionary review and *certiorari,* since they were not final judgments of the "highest court of a State in which a decision could be had." *Minneapolis, St. Paul and S.S.M.R. Co. v. Rock,* 279 U.S. 410 (1929); *Virginian R. Co. v. Mullens,* 271 U.S. 220 (1926); *American Railway Express Co. v. Levee,* 263 U.S. 19, 21 (1923). Therefore, copies of these petitions and the statutes and rules authorizing same are not printed in this petition and the Court's orders of denial are not discussed herein.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

Petitioner appealed the April 21, 1976 judgment of the Court of Appeals to the Supreme Court of North Carolina, of right under Section 7A-30 of the General Statutes of North Carolina and Rule 14 of the North Carolina Rules of Appellate Procedure. The Supreme Court's dismissal of this appeal *ex mero motu* amounted to an affirmance of the Court of Appeals decision. The Supreme Court judgment is reviewable by this Court. *Tumey v. Ohio,* 273 U.S. 510, 515 (1927).

Rule 16 of the North Carolina Rules of Appellate Procedure (see Appendix B, *infra,* p. 16a), codifying prior case law, *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968), states: "A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals nor to those questions upon whose existence the appeal of right or the discretionary review is based." When constitutional issues have been raised, the United States Supreme Court has the power, indeed the duty, to examine the whole record and arrive at an independent judgment as to whether constitutional rights have been invaded. *General Motors Corp. v. Washington,* 377 U.S. 436 (1964); *New York Times v. Sullivan,* 376 U.S. 254 (1964).

Accordingly, petitioner respectfully submits that the scope of review of this Court—should it issue a writ of *certiorari*—extends to the judgments of the Supreme Court of North Carolina and the North Carolina Court of Appeals, to the orders of the Superior Court of Wake County, and to the

decision of the North Carolina Board of Law Examiners, from which relief was initially sought.

Therefore, this petition deals with all such matters.

I.

Compelling Policy Reasons Suggest Review by the United States Supreme Court

Compelling public policy reasons, aside from the personal fate of this petitioner, suggest that the case at bar merits review by the Supreme Court of the United States: This Court has decided numerous cases involving applicants for admission to the bar by examination, *e.g. Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957); *Konigsberg v. State Bar of California,* 353 U.S. 252 (1957); *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963); *Law Students Civil Rights Research Council, Inc. v. Wadmond,* 401 U.S. 154 (1971) and *In re Griffiths,* 413 U.S. 717 (1973).

As far as petitioner is aware, however, the Court has never dealt directly with the laws governing admissions to the bars of the various states by comity (reciprocity).

As the trend toward increased participation in the legal profession continues despite uncertainty as to the economic prospects for its practitioners, the American people remain a highly mobile group, and it would seem an appropriate time—and this case a particularly appropriate vehicle—for this Court to provide clarity as to the federal constitutional standards to which state bar examiners must adhere, in dealing with the volume of applications from attorneys who seek careers outside the initial licensing jurisdiction. For example, where bar examiners are permitted by local courts to have virtually untrammeled comity discretion without a requirement to justify their decisions by findings of fact, or to publish a record of proceedings (as is apparently the case in North Carolina), the opportunities for secret transgressions of the "equal protection" as well as the "due process" clause of the Fourteenth Amendment are limitless. In the absence of an expression from this Court comparable to its rulings on issues such as those raised in *Schware, Konigsberg, Willner, Wadmond* and *Griffiths, supra,* comity applicants aggrieved by the apparent failure of state licensing boards to observe constitutional standards can only add to the workload of lower federal and state courts.

Moreover, if the decisions here of the North Carolina courts and the Board of Law Examiners are permitted to stand, and are reflected in other jurisdictions by comparable hostility toward attorneys formerly in federal service and skepticism about their professional work, the United States Government will surely find itself somewhat less able to attract competent members of the bar for short-term periods of employment in their early or mid-careers, particularly in Washington. Neither such potential recruits nor even freshly-minted J.D. degree holders will be strongly tempted to enter federal service if years later—should personal circumstances dictate a move to another jurisdiction—they are to find that their experience counts for no more than that of the most recent untested law graduate. The effect would be particularly chilling on those who (as did petitioner) seek out responsibilities in federal agencies operating in new and controversial areas of the law, if later their demonstrated competence is to be ignored by parochial interests suspicious of advocates of unwanted social change, and reluctant to accept the competition of outsiders under any circumstances.

Even among attorneys not desiring any federal experience, local rules and attitudes can restrict the mobility of, and public access to, intellectual talents in the law (and other) professions.

The foregoing are some of the broader implications and considerations raised by the prior proceedings in this case, to the legal and constitutional infirmities of which petitioner now invites the Court's attention.

II.

The North Carolina Supreme Court's Failure to Review an Appeal of Right Provided by Statute Merits Review by This Court

The Supreme Court of North Carolina's dismissal *ex mero motu* of petitioner's appeal from the Court of Appeals decision of April 21, 1976 evaded the statutory mandate by which the rights of litigants are governed.

Section 7A-30 of the General Statutes of North Carolina (Appendix B, *infra,* p. 10a) provides in pertinent part for appeal *of right* to the Supreme Court from "any decision of the Court of Appeals rendered in a case (1) which directly involves a substantial question arising under the Constitution of the United States or of this State . . ."

This case precisely fits that statutory standard.

There can be no question that the right to practice one's profession is a substantial right. "The practice of law is not a matter of grace, but of right, for one who is qualified by his learning and his moral character." *Baird v. State Bar of Arizona,* 401 U.S. 1, 8 (1971). See also *In re Griffiths, supra,* at 720, where this Court stated, quoting *Truax v. Raich,* 239 U.S. 33, 35 (1915): "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

The adverse decision of the respondent Board of Law Examiners as to petitioner's eligibility for comity admission under its Rule VII, 1, (5)b, i (Appendix B, *infra,* p. 19a) was entered, as we shall see, unsupported by any competent evidence; entered without the finding of any facts on which the Board's conclusion was based; entered in the face of overwhelming factual support for petitioner's application, much of it adduced by the Board itself (R. 99-130; 180-194) and, indeed, entered following pointless harassment of petitioner by the Board's Chairman at his hearing before it. This decision, and the Board's failure to render any decision as to petitioner's eligibility in the applicant category (Rule VII, 1, (5)b, ii) to which he most obviously belonged, fit the classic mold of arbitrary, capricious and unreasonable conduct proscribed by the "due process" clause of the Fourteenth Amendment. This Court has consistently held that "a state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene . . . the Fourteenth Amendment." *Schware v. Board of Bar Examiners, supra,* at 238-239, citing *Dent v. State of West Virginia,* 129 U.S. 114 (1889). Cf. *Slochower v. Board of Education,* 350 U.S. 551 (1956); *Wieman v. Updegraff,* 344 U.S. 183 (1952).

As detailed hereinabove (pp. 11-14) this substantial constitutional question was carefully raised by petitioner at each stage of these proceedings, through three tiers of the court system of North Carolina, to no avail.

The failure of the Supreme Court of North Carolina to observe the statutory scheme for hearing appeals, and its refusal to hear and decide a case in which substantial constitutional questions were clearly, timely and repeatedly raised—or even to review a judgment on procedural law of the next highest appellate court, which therein ignored the Supreme Court's own decisions—merits the close scrutiny of the record by this Court through review by *certiorari.* Such

review could extend to the State Supreme Court's action standing alone, or in conjunction with the patterns of administrative and judicial evasiveness that have prevailed in this case since it began on March 3, 1973.

III.

The North Carolina Court of Appeals Resorted to Groundless Procedural Technicalities to Avoid a Decision on the Merits

This Court has repeatedly held that a state court may not evade the determination of federal constitutional issues and deprive the United States Supreme Court of jurisdiction to review such a determination by grounding its judgment upon technicalities of state procedure. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler,* 263 U.S. 22, 24 (1923). See also *American Railway Express Co. v. Levee, supra,* at 21; *Rogers v. Alabama,* 192 U.S. 226, 230 (1904); *Ellis v. Dixon,* 349 U.S. 458, 463 (1955); *Ward v. Love County,* 253 U.S. 17, 22 (1920); *Staub v. City of Baxley,* 355 U.S. 313, 319 (1958); and *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 457 (1958).

What this Court has thus proscribed is exactly what the North Carolina Court of Appeals sought to do in its decision in petitioner's case, which the Supreme Court of North Carolina chose to leave undisturbed. Moreover, the Court of Appeals was apparently not able to find any *valid* procedural basis for depriving petitioner of a judicial review on the merits, but—raising the jurisdictional issue on its own initiative—relied on procedural premises utterly without foundation in the law of North Carolina.

As Justice Frankfurter said of the North Carolina Supreme Court in *Angel v. Bullington,* 330 U.S. 183, 189 (1947), "[W]hether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. *That Court could not put a federal claim aside, as though it were not in litigation, by the talismanic word 'jurisdiction.'*" (Emphasis added).

The "talismanic word 'jurisdiction'" was in fact seized here by the North Carolina Court of Appeals, and its avoidance of jurisdiction to decide petitioner's case was grounded on a fundamental misconception of the nature and legal effect of petitioner's Rule 52(b) motion filed in Wake County Superior Court April 1, 1975, in which he asked the Court to amend its findings, make additional findings or amend its March 20 judgment.

Raising the jurisdictional question on its own motion—as the record shows (R. 94), respondents at no time had raised it—the Court of Appeals first decided (Appendix A, *infra,* p. 4a), *in sole reliance* upon the provisions of Sections 143-307, 143-309, 143-314, 143-315 and 143-316 of the General Statutes of North Carolina,[5] that petitioner's motion was a legal nullity: The Court had no authority under G.S. 143-307 *et seq.* to make findings of fact.

This conclusion ignored the statute law of North Carolina, since petitioner brought his action (R. 3) under G.S. 1-269 (Appendix B, *infra,* p. 7a), *not* under G.S. 143-307 *et seq.*, which by the statute's definitional section, G.S. 143-306, is not an exclusive remedy or procedure. The Court of Appeals, moreover, ignored the Supreme Court of North Carolina's long standing decision in *Baker v. Varser,* 239 N.C. 180,

[5] **G.S. 143-306 through G.S. 143-316 are found in Volume 3C, General Statutes of North Carolina, Replacement 1974 (The Michie Co.), at pages 287-293. Effective February 1, 1976, they became G.S. 150A-43 to G.S. 150A-52, found in Volume 3C, 1975 Cumulative Supplement, pages 313-315.**

79 S.E. 2d 757 (1954) that G.S. 143-306 *et seq.* do not apply to appeals from the Board of Law Examiners.[6]

The provisions of G.S. 143-307 *et seq.*, therefore, have nothing to do with this case and could not have placed any limitation whatever upon the Superior Court's power to afford petitioner the relief sought in his Rule 52(b) motion, *i.e.*, additional or amended findings of fact. Petitioner is aware of no rule whatever in the law of North Carolina which proscribes a judge sitting, as here, in an appellate capacity in a *certiorari* hearing, from making or amending findings of fact;[7] indeed, when the bar applicant, Willis,

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[6] G.S. 143-306 *et seq.* were enacted as Chapter 1094 of the Session Laws of 1953. Chapter 1012 of the Session Laws of 1953 added to G.S. 84-24 the following sentence: "Appeals from the Board [of Law Examiners] shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court." In *Baker v. Varser*, 239 N.C. at 185, it appears that the Board of Law Examiners contended in a motion in Superior Court that Chapter 1012 "takes the Board of Law Examiners out from under the provision of Chapter 1094 of the 1953 Session Laws." The Superior Court judge denied the Board's motion; the Board appealed; and the Supreme Court reversed the orders of the Superior Court, holding that Baker's pleadings would be treated as a petition for *certiorari:* A clear holding that G.S. 143-306 *et seq.* (Chapter 1094 of the 1953 Session Laws) do not apply to appeals from the Board of Law Examiners, as the Board had contended in the lower court.

[7] In fact, the law of North Carolina gives broad powers to a Court in *certiorari* proceedings: "The writ of *certiorari* brings the entire record up for review . . . . Its . . . office extends to the review of all questions of jurisdiction, power and authority of the inferior tribunal to do the action complained of." *Turner v. Board of Education*, 250 N.C. 456, 461, 109 S.E. 2d 211 (1959). A grant of appellate jurisdiction, as in *certiorari*, implies plenary powers. See 4 Am. Jur. 2d, *Appeal and Error*, § 5, p. 536.

appealed from a Board ruling, this same judge, Judge McKinnon, made "detailed findings of fact"; see *In re Willis*, 286 N.C. 207, 208, 209 S.E. 2d 457 (1974).

Since the Court of Appeals' reliance upon G.S. 143-307 *et seq.* was entirely misplaced, and *since the law of North Carolina did not otherwise prevent Judge McKinnon from granting petitioner's 52(b) motion, in whole or in part,* the logical structure of the Court of Appeals opinion (see Appendix A, *infra,* p. 4a)—that only the March 20 order survived; that the March 20 order was not timely noticed for appeal within the 10-day period specified in G.S. 1-279 (see Appendix B, *infra,* p. 8a); therefore, the Court of Appeals lacked jurisdiction—must collapse: The house stands upon a foundation of sand.

In other words, the *only* route by which the Court of Appeals could reach the apparently desired result of disavowing jurisdiction was the spurious reliance on G.S. 143-307 *et seq.*, for this was the only way it was able to avoid confronting the obvious: that there was indeed before it a "judicial order . . . of a judge of the superior court" appealable under G.S. 1-277 (Appendix B, *infra,* p. 7a). Petitioner timely exercised his right under G.S. 1-277, within the 10-day period specified by G.S. 1-279; the order was pronounced in court June 18, 1975, was noticed for appeal June 24, 1975, and was signed June 27, 1925 (Appendix C, *infra,* p. 24a); As Judge McKinnon himself noted (Appendix C, *infra,* p. 26a), the June 27 order was the "final judgment rendered" in the case. Moreover, he found on June 24, 1975 that "in apt time" the petitioner "gives notice of appeal" to *both* the March 20 and June orders, (Appendix C, *infra,* p. 25a).

The orders of Judge McKinnon signed June 24, 1975, June 27, 1975 and July 9, 1975, particularly his finding that the petitioner's appeal was taken "in apt time," are conclusive with regard to the timeliness of petitioner's notice of appeal,

and by operation of law, this invoked the Court of Appeals' jurisdiction, no matter to what tortuous lengths of illogic or other intellectual acrobatics it went to avoid it. "The record imports verity, and the Supreme Court is bound thereby." *Respass v. Bonner,* 237 N.C. 310, 313, 74 S.E. 2d 721 (1953).[8]

[8] It seems clear, in any event, that the filing of a Rule 52(b) motion tolled the running of the 10-day period for taking appeals. The current procedure in North Carolina specifically so provides, for appeals noticed after July 1, 1975. See G.S. 1-279, as amended (Appendix B, *infra,* p. 8a) and Rule 3(c) of the North Carolina Rules of Appellate Procedure (Appendix B, *infra,* p. 13a). As to the prior practice there seems to be no judicial interpretation of the point in North Carolina. However, in *Wiggins v. Bunch,* 280 N.C. 106, 184 S.E. 2d 879 (1971) the Supreme Court looked to federal judicial interpretations of the Federal Rules of Civil Procedure in deciding a case of first impression under the then recently-adopted and comparable North Carolina Rules (in that case, Rule 60). Had the North Carolina Court of Appeals in this case been equally as diligent and as receptive to federal court precedent as was the Supreme Court in *Wiggins,* it could easily have discovered that under the federal practice, a Rule 52(b) motion does indeed toll the appeal period. On that authority, the Court of Appeals would have found no procedural bar whatever to hearing and deciding petitioner's case on the merits. See *Leishman v. Associated Wholesale Electric Co.,* 318 U.S. 203 (1943).

As logic and common sense suggest, and as the draftsmen of the amended G.S. 1-279 and of Rule 3(c) evidently recognized, a Rule 52(b) motion *must* toll the 10-day appeal period. *Wiggins v. Bunch* held that an appeal takes a case out of the jurisdiction of a trial court, so that the trial court in that case was without authority to consider plaintiff's Rule 60 motion. It necessarily follows from *Wiggins* that—prior to the amendment of G.S. 1-279—Rule 52(b) would have been a useless device to a party who sought to use it, if a motion thereunder did *not* toll the 10-day period, because a party complying with former G.S. 1-279 would automatically have divested the court to which a Rule 52(b) motion might be directed of any authority to pass on it.

A careful reading of the Court of Appeals opinion herein, in the context discussed above and in the footnote numbered (8), dealing with the tolling of the appeal period by the filing of a Rule 52(b) motion, reveals a resort to legally and logically insupportable, artificial and ill-conceived theories of local procedure to avoid passing on the issues raised in, and the federal constitutional merits of, petitioner's appeal. As noted above, this Court on numerous occasions has refused to countenance state court evasiveness where federally-protected rights are involved. In view of the fact that the Supreme Court of North Carolina, like the priest and the Levite in the 10th Chapter of the Gospel According to St. Luke, "passed by on the other side," only the intervention of this Court can guarantee the judicial review of the merits of petitioner's appeal to which he is constitutionally entitled.

IV.

The Actions of the Board and the Lower Court in Denying Petitioner's Admission by Comity Were Arbitrary and Capricious in Violation of Petitioner's Constitutional Rights

The general rule defining conduct by an administrative agency as arbitrary, unreasonable, capricious and an abuse of discretion is stated in 2 Am. Jur. 2d, *Administrative Law,* § 651, pp. 509-510 as follows: "Without question agency action which is unconstitutional, contrary to law, illegal . . . is arbitrary, capricious, unreasonable, or an abuse of discretion; action which is condemned by such terms is not redeemed by the presence of good faith or even high purpose. Action has been held arbitrary where it requires more than the statute provides for, where it is taken in the absence of objective standards, where it is based on considerations irrelevant to the power reposed. . . . Action is arbitrary, capricious, unreasonable or an abuse of discretion where it

represents the will or whim of an agency rather than its judgment, or where it has no reasonable basis, no reasonable relation to a lawful purpose, or is without support in the evidence."

(a)

Neither the Board Nor the Lower Court Made Any Findings of Fact to Support Their Conclusions

As its ruling of March 3, 1975 (Appendix C, *infra,* p. 21a) indicates, the respondent Board found that petitioner had not proved to its satisfaction[9] that during his service at EEOC and HUD he had actively and substantially engaged in the "practice of law as defined by G.S. 84-2.1." Neither the Board nor the Superior Court of Wake County, in affirming the Board's ruling, made any findings of fact whatever to support such a conclusion.

It appears from the only reported North Carolina cases dealing with appeals from the Board of Law Examiners *(Baker v. Varser, supra; Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 90 (1954); *In re Willis,* 286 N.C. 207, 209 S.E. 2d 457 (1974); *In re Willis,* 288 N.C. 1, 215 S.E. 2d 771

[9] Faced with a determination such as the Board issued to petitioner, any applicant would have to enjoy the powers of clairvoyance to understand what evidence one must marshal to "satisfy" the respondents; certainly their rules contain no hint of a Satisfaction Quotient or any other standards by which applicants, the Bar, the Courts or the public generally could determine what the Board demands. Such inadequacy in the Board's rules is a continuing open invitation to the type of arbitrary conduct of which petitioner here complains. The Board's failure to reveal the mystique of its judgmental processes by even the limited measure of issuing findings of fact is arbitrary, capricious, and, therefore, unconstitutional.

(1975)), that the Board in the case of both applicants, *Baker,* 240 N.C. at 265, 266 and *Willis,* 286 N.C. at 207, made specific findings of fact in support of its conclusions. In *Willis,* which came before the same Judge McKinnon who heard petitioner's case, both the Board and the Court itself made "detailed findings of fact." 286 N.C. at 207, 208. That petitioner was not afforded the same treatment as Messrs. Baker and Willis is itself persuasive evidence of respondents' design, in which the Superior Court acquiesced, arbitrarily to deny petitioner the same privileges afforded others who came before it.

Petitioner's grievance in this respect, however, is far more serious than merely the personal affront of sustaining disparate treatment at official hands: Both the respondent Board and the Superior Court of Wake County paid no heed to decisions of the North Carolina Court of Appeals and of this Court itself.

As the North Carolina Court of Appeals stated: "The necessity for the finding of facts and entry thereof, and for the conclusions of law to be drawn from the facts, is to allow review by the appellate courts. Without such findings and conclusions, we are unable to determine whether or not the judge correctly found the facts or applied the law thereto." *Jones v. Murdock,* 20 N.C. App. 746, 747, 203 S.E. 2d 102 (1974).

A determination by a board of bar examiners that an applicant does not satisfy its rules as to what constitutes the "practice of law" is no less subjective than a ruling that an applicant does not meet its standards of character. The analogy is further appropriate since here (as in character cases) the evidence gathered by the respondent Board was not available to petitioner at the time of his hearing, but became so only through the processes of discovery (R. 32-35, 39-41). Under the reasoning and rule of *Willner v. Com-*

mittee on Character and Fitness, supra, the respondent Board had the duty to notify petitioner, through findings of fact, of the basis for his rejection. Cf. *Martin-Trigona v. Underwood,* 529 F. 2d 33, 37 (7th Cir. 1975). The Board having failed to meet that responsibility, it became the duty of the Superior Court, under the law of North Carolina and of the decision of this Court, to remedy that deficiency, if petitioner was to have adequate appellate review of the Board's and the Court's decisions. This the Superior Court failed to do.

A state court cannot deprive a litigant of a federal right by omitting to pass upon basic questions of fact. In this situation, the Supreme Court of the United States will examine the record itself to determine "what facts reasonably might be and presumably would be found therefrom by the state court." *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 703 (1945).

(b)

There Was No Competent Evidence to Support the Board's and the Lower Court's Decisions

As this Court stated in *Schware, supra,* at 239: "Even in applying permissible standards, officers of a State cannot exclude an applicant where there is no basis for their finding that he fails to meet these standards. . . ." The reluctance of the respondent Board, and of the one court which chose to consider the merits of the case, to undertake the doubtless embarrassing task of entering findings of fact here is readily understandable: *The plain truth of the matter is that there was no competent evidence whatever to support the Board's decision.* It is a principle of law too elementary to require citation that rulings of administrative bodies without any support in the evidence cannot survive "due process" scrutiny as being arbitrary and capricious, and abusive of the discretion vested in them.

(c)

The Evidence Before the Board Overwhelmingly Established That Petitioner Satisfied the Board's Rule Under Statutory and Judicial Interpretations It Was Bound to Follow

G.S. 84-2.1, which is the standard the respondent Board itself chose to adopt, defines "practice law" as follows (see Appendix B, *infra,* p. 10a):

> "The phrase 'practice law' as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel or otherwise in any such legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase 'practice law' shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition."

G.S. 84-2.1 on its face makes mandatory a broad, all-inclusive interpretation of conduct constituting the practice of law. The Supreme Court of North Carolina has twice so interpreted the statute, and the respondent Board and the Superior Court of Wake County were not free to adopt a narrower standard. See *Seawell v. Carolina Motor Club,* 209

N.C. 624, 631, 184 S.E. 540 (1936), where the Court said: "The practice of law is not limited to the conduct of cases in court. . . . In a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in Court." See also *State v. Pledger,* 257 N.C. 634, 636, 127 S.E. 2d 337 (1962). The interpretation of the courts will prevail over that of an administrative body. *Faizan v. Insurance Co.,* 254 N.C. 47, 57, 118 S.E. 2d 303 (1961). Administrative boards do not make law. *Motsinger v. Perryman,* 218 N.C. 15, 20, 9 S.E. 2d 511 (1940).

Petitioner submits that under the broad interpretation of the phrase "practice of law" in Rule VII, Section 1, (5)b, i, which the Legislature and Supreme Court of North Carolina made binding upon the Board and the Superior Court of Wake County, the overwhelming weight of the evidence (see pp. 7-10 above) established that his activities at EEOC and HUD complied with the Board's requirement that he have been "actively and substantially engaged" in such practice.

His position is supported by decisions of the Supreme Courts of three other states which have considered factually similar situations; while not necessarily binding in North Carolina, these decisions were nevertheless illustrative of a judicial approach which would have been especially appropriate in the absence of a North Carolina decision interpreting the comity rules. See *State ex rel Devine v. Schwarzwalder,* 165 Ohio St. 447, 136 N.E. 2d 47 (1956) (on "all fours" as to Schwarzwalder's services as a bureau chief in the Ohio State Department of Liquor Control); *Harty v. Board of Bar Examiners,* 81 N.M. 116, 464 P. 2d 406 (1970); and *Application of Payne,* 430 P. 2d 566 (Alaska Sup. Ct. 1967). These decisions, along with *Seawell v. Carolina Motor Club, supra,* suggest that in determining whether petitioner was

practicing law as defined in G.S. 84-2.1, it was irrelevant and immaterial as a matter of law that petitioner was not labelled "attorney," did not prepare or try cases in court; that his duties could have been performed by laymen; or that at HUD there was a General Counsel who performed legal services, etc. The test under G.S. 84-2.1 is *what petitioner did,* not what others could do, did, or were authorized to do. His case should have been decided by that standard.

Accompanying petitioner's application was a memorandum of law citing *Schwarzwalder, Payne, Harty* and *Carolina Motor Club, supra,* (R. 163-167). Insofar as the Board's cryptic ruling permits speculation as to its deliberations, it ignored them. Before the lower court were the texts of the opinions in *Schwarzwalder, Harty* and *Payne* (R. 5) as well as the affidavit of the former Corporate Counsel of the District of Columbia as to the prevailing law in that jurisdiction (R. 19-21), which supports petitioner's contention. In its answer (R. 27) the Board found the law of the jurisdiction from which petitioner sought comity "irrelevant and immaterial." The Superior Court seems to have agreed.

Unresponsiveness to the mandate of the Legislature and the Supreme Court of North Carolina as to the proper interpretation of the statute contained in the Board's own rule, and indifference to the pertinent decisions of the highest authorities of other jurisdictions, and of the chief legal officer of the District of Columbia, are hardly hallmarks of reasoned, careful deliberation by the Board or the lower court.

(d)

Petitioner Was Subjected to Pointless Harassment by the Board's Chairman During His Hearing

Further documenting the arbitrary conduct which has permeated these proceedings at least since March 3, 1973, peti-

tioner cites the attitude toward him demonstrated by the Board's Chairman during his hearing on that date, as shown in the record (R. 194, 196, 197, 198, 199).

Petitioner was frequently interrupted during his presentation by the Chairman (who at the time of the hearing was Mr. Mills). He was not permitted to complete answers to questions propounded by other members of the Board, or to explain the answers he had given. The petitioner was not a criminal "in the dock"; as the record shows (R. 99, 102-107, 109-111, 122-123, 125-127), he had been a respected member of the Bar for more than 20 years and a high official of the United States Government for seven of those years; he was a native of the State of North Carolina; and he was entitled to be treated in a professional manner: The impatience and discourtesy displayed by the Chairman, and his insinuations that petitioner was not being responsive to the Board's questions undoubtedly prejudiced other members of the Board against the petitioner. In fact, many of the questions propounded had nothing whatever to do with the issues before the Board, which were petitioner's character and professional competence.[10]

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[10] After the Board members concluded with their questions about petitioner's service at EEOC and HUD, they engaged in dialogue with him (R. 194-200) apparently designed to insinuate in some way that he had been doing something improper. As the Board well knew (R. 151, 152, 194, 195) petitioner was a *party* in two lawsuits in which it was perfectly proper to represent himself. After petitioner stated that as a party he had been "working with my lawyer" and "worked at [that lawyer's] office" on the litigation in which they were engaged (R. 195), and after he had made clear at that stage of the interrogation that Mr. Brogden was his lawyer in whose office he had worked, Mr. Mills returned to the subject (R. 199), peremptorily demanding information already in the record; likewise, Mr. Mills (R. 199) harangued petitioner about his sister's role in the lawsuit, which had already been explained by petitioner

For example:

(R. 192):

MR. STACY: During the period of time of 1969 to 1972, did you prepare or assist in the preparation of a trial of any case?

MR. MARKHAM: I don't recall a specific instance. In some cases where there had been a decision in the trial court, the issue came before the department as to whether an appeal should be taken.

MR. MILLS: Mr. Markham, Mr. Stacy didn't ask you anything about the appeal, he just asked you if you had participated in any trials, and I think if you would confine your answers to his questions, we will be able to get along here much faster.

* * * * *

(R. 196):

MR. STACY: Well, did the suit that Mr. Penny filed, name you and your sister as party defendants?

MR. MARKHAM: Well, the Urban Renewal Agency was petitioner and myself and my sister and all the other heirs were respondents.

MR. MILLS: Did you understand Mr. Stacy's question?

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three times (R. 195, 196, 197). Such discussion was hardly relevant to petitioner's qualifications for admission, but even if it had been, the constant interruptions of petitioner by the Board members made it impossible for him to explain the circumstances in any coherent way, as the record shows.

It is difficult to understand how petitioner's answer could have been any more responsive to Mr. Stacy's question. Mr. Mills, however, pressed his tactics further:

(R. 197):

MR. STACY: Had you ever employed Mr. Penny yourself?

MR. MARKHAM: Well, as I explained, I, because of my position with HUD, I couldn't under the advice of my superior, I couldn't raise the . . .

MR. MILLS: Mr. Markham, Mr. Stacy asked you a specific question. We would like for you to answer that question.

MR. MARKHAM: No, I was not. Mr. Penny was not representing me directly.

MR. MILLS: I believe his question was did you ever employ him.

MR. MARKHAM: No, I did not employ him.

* * * * *

(R. 198, 199):

MR. MILLS: Mr. Markham, during the course of your examination, you stated I worked in my cousin's office, in reference to this. . . . How long did you work in his office?

MR. MARKHAM: Well, I have not been paid by him. I have . . . in connection . . .

MR. MILLS: I didn't ask you whether you had been paid. I said how long have you worked in this office?

Nothing could more clearly illustrate the Chairman's perception of this hearing as an adversary proceeding than his characterization of the applicant's appearance as an "examination," and his repeated reliance on overbearing courtroom tactics in questioning a fellow attorney—one whose character and integrity were not challenged by anything the Board's record showed. The attitude of its Chairman could not fail to have infected the Board's deliberations, to petitioner's detriment.

Petitioner is under no illusion as to why he was subjected to this harassment by Chairman Mills, nor should this Court be: The record before the Board necessarily contained massive evidence of petitioner's activities at EEOC, many of which had a substantial and direct impact upon employers in various major industries in the United States, including insurance and utility employers. Since under the North Carolina procedure governing review by *certiorari,* petitioner was bound by the record before the Board and after his Board hearing could adduce no further evidence for the consideration of the courts, he respectfully asks this Court to judicially notice the roster of "representative clients" listed by Mr. Mills' firm in the 1972 edition of the Martindale-Hubbell Law Directory,[11] including an impressive roster of insurance

[11] See Martindale-Hubbell Law Directory, Vol. III, 1972 Ed., pp. 2072B, 2073B: "Representative clients: Duke Power Co.; Economy Finance Co., Inc.; Public Service Company of N. C.; Southern Railway Co.; The Coca-Cola Bottlers' Assn.; Bankers Life & Casualty Co.; Jefferson Standard Life Insurance Co.; Life Insurance Co. of Virginia; Metropolitan Life Insurance Co.; Pilot Life Insurance Co.; Western & Southern Life Insurance Co.; Aetna Casualty & Surety Co.; Allstate Insurance Co.; Dixie Fire and Casualty Co.; Employers Mutual Casualty Co.; Fidelity & Casualty Co. of N. Y.; Great American Group; Harleysville Mutual Insurance Co.; Insurance Company of North America; Liberty Mutual Insurance Co.; Lumbermens Mutual Casualty Co.; Maryland Casualty Co.; Nationwide Insurance Co.; New Amsterdam Casualty Co.; North Carolina Farm Bureau Mutual Insurance Co.; Pepsi-Cola Bottlers' Assn.; Shelby Mutual; Travelers Indemnity Co.; United States Casualty Co.; United States Fidelity & Guaranty Co."

companies, and, at the head of the list, Duke Power Co., the losing litigant in the *Griggs* case—one of the ornaments of petitioner's government tenure and of the agency which he served.

On the foregoing grounds, among others which could be further developed on brief should this Court grant *certiorari,* it is clear that the respondent Board's decision herein satisfies, in nearly every particular, the "hornbook" definition of arbitrary, capricious and unreasonable official conduct cited in the preface to part IV hereof. It is within the province of this Court—and now of this Court only—to strike down that decision as falling far below the standards of the Fourteenth Amendment.

V

Petitioner Was Denied "Due Process" By the Failure of the Lower Court to Decide His Eligibility Under Board Rule VII, Section 1, (5)b, ii

Nothing could more quickly and effectively undermine the concept of "due process of law" than for courts of initial jurisdiction to refuse to decide issues clearly and properly placed before them by litigants who come there to seek justice. A "process" of "law" can hardly *begin* otherwise. As the North Carolina Supreme Court made clear in *Trucking Co. v. Dowless,* 249 N.C. 346, 351, 106 S.E. 2d 510 (1959), quoting *Hicks v. Koutro,* 249 N.C. 61, 105 S.E. 2d 196 (1958):

> "'. . . A judgment is conclusive as to all issues raised by the pleadings. WHEN ISSUES ARE PRESENTED IT IS THE DUTY OF THE COURT TO DISPOSE OF THEM. . . . The law requires a lawsuit to be tried as a whole and not as fractions. Moreover, it contemplates the entry

> of a judgment which will completely and finally determine all the rights of the parties.'" (Emphasis added.)

In his petition in the Superior Court of Wake County (R. 3, 6, 15, 16, and 17) petitioner raised the issue of the respondent's failure to determine his eligibility for admission as one who had "actively and substantially engaged in activities which would constitute the practice of law if done for the general public." (Board Rule VII, 1, (5)b, ii). He again raised this issue in his Rule 52(b) motion (R. 46, 47, 48, 60, 61). Twice the Superior Court of Wake County declined to rule on an issue squarely before it, despite the "duty" prescribed for it by the State Supreme Court. Twice (R. 19, 60, 61) petitioner asked the Superior Court of Wake County to remand the matter to the Board for a determination of the issue. Twice the Court declined.

To this day, petitioner has gained no judicial consideration whatever of his eligibility under Rule VII, 1, (5)b, ii. If anything, he is even more eligible for comity under this provision of the rules than under the rule the Board and the Court *did* consider. Whether or not petitioner was actively and substantially engaged in the "practice of law" at EEOC and HUD, it cannot be challenged on this record that he was actively and substantially engaged in "activities" there; and those "activities"—writing and interpreting legal documents, giving legal advice, reviewing contracts, preparing evidence for legal proceedings (pp. 7-10 *supra*)—would constitute the practice of law if he had performed them for the general public.

The very language of Board Rule VII, 1, (5)b, ii, implies the Board's intention to admit by comity attorneys from other jurisdictions who did *not* perform legal services for the public, but for corporations or, as in this case, for the federal government. If this were not so, there would be no reason for subpart ii at all. (It should be noted that subpart ii was

added when the Board rewrote its rules in 1971. Cf. 279 N.C. 736 with the prior rule, adopted in 1970 and found in 277 N.C. 734, where the requirement conforms to what is now subpart i. Since the rules were completely rewritten only one year before the present rule was adopted, one must assume that the addition of subpart ii was not the result of an inadvertent redundancy.)

It is within the province of this Court to decide that petitioner clearly satisfied the cited sub-section of the Board's rule and is, therefore, eligible for admission by comity to the Bar of North Carolina. Even to grant *certiorari* limited to this issue alone would afford petitioner the judicial determination to which he is entitled under the law of North Carolina and which he has repeatedly and unsuccessfully sought since April 2, 1973.

VI.

There is No Rational Connection Between the Respondent's Apparent Requirements and Petitioner's Fitness and Capacity to Practice Law

Less than two and a half years before it decided petitioner's case, the respondent Board had already been sternly admonished by a three-judge United States District Court in *Keenan v. Board of Law Examiners of the State of North Carolina,* 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) that: "In licensing attorneys there is but one constitutionally permissible state objective: the assurance that the applicant is capable and fit to practice law. 'While a state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *any qualification must have a rational connection with the applicant's fitness or capacity to practice law.' Schware v. Bar Examiners,* 353 U.S. 232, 239, 77 S.Ct. 752, 756 (1957) (emphasis added)."

Petitioner suggests that the relevant consideration for admission by comity is whether the comity applicant is a member of the bar who has been using his legal skills, talents and training with sufficient regularity, and in areas of sufficient scope, to justify the Board's confidence that the public, his future clients, and the reputation of the bar will not suffer from the applicant's professional inadequacies should he or she be admitted without examination.

To superimpose upon the statutory definition of "practice of law" and the published Board rules referring to that definition some arcane, *in camera* requirement that these skills, talents and training must have been employed in a specific way—such as constantly appearing in court—is an act of whim and caprice; such a qualification has no reasonable relation, no rational connection to the proper ends of the Board's comity rule. The record shows that petitioner was an attorney of 14 years' professional experience before he returned to government service (including at least five years in courtroom practice). The type of activities he pursued in government between 1965 and 1972 can only have enhanced his legal skills, judgment and the other qualities which clients seek and the public, the bar and the courts demand.

The record is too well documented to require repetition here as to the rich variety of legal services performed by petitioner at EEOC and HUD. Beyond that, the respondent Board on its own initiative gathered testimonials as to petitioner's character, fitness, or legal ability from at least 15 persons (R. 102-127) in all walks of life—practicing lawyers, a judge, government officials, a magazine editor and others, including former clients. The Supreme Court of North Carolina, in fact, has already paid him a rare tribute in its opinion in the case of *In re Markham,* 259 N.C. 566, 131 S.E. 2d 329 (1963) which he argued before that Court. There Justice Bobbitt, speaking for the Court, commented upon the "excellent briefs" (259 N.C. at 571) filed in be-

half of Sadie H. Markham (petitioner's mother: R. 133) by petitioner and his colleague.

On this record petitioner has clearly established his capability and fitness to practice at the Bar of North Carolina.

The Board, ignoring the strictures of the three-judge court in *Keenan, supra,* decided otherwise. Petitioner respectfully submits that the time has come for the respondents to receive further judicial enlightenment—from the highest court of the land.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of *certiorari* be granted.

Respectfully submitted,

CHARLES B. MARKHAM
204 North Dillard Street
Durham, North Carolina 27701
Petitioner
Pro se.

APPENDIX

APPENDIX A

No. 7510SC811

NORTH CAROLINA COURT OF APPEALS

Filed: 21 April 1976

CHARLES B. MARKHAM
v.
JAMES B. SWAILS, Chairman, and HORACE E. STACY, JR., EMERSON P. DAMERON, ROBERT C. HOWISON, JR., W. H. MCELWEE, GEORGE H. MCNEILL, FRANCIS I. PARKER, WALTER R. MCGUIRE, ERIC C. MICHAUX, all members of the BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, and the BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA

Wake County
No. 73CVS3117

Appeal by petitioner from McKinnon, Judge. Orders entered 20 March and 27 June 1975 in Superior Court, Wake County. Heard in the Court of Appeals 10 February 1976.

On 23 August 1972, Charles B. Markham (petitioner) made application to the Board of Law Examiners of the State of North Carolina (respondents) for the issuance of a license to practice law in this State pursuant to Rule VII of the rules governing admission by comity to the practice of law in North Carolina. On 7 March 1973, after a hearing, the Board denied the application. On 2 April 1973, petitioner filed a petition in the Superior Court for a writ of certiorari for judicial review of the administrative decision of the Board denying the application. On 20 March 1975, after reviewing the record of the proceedings before the Board and having

considered briefs and oral arguments of counsel, Judge McKinnon entered an order affirming the decision of the Board. On 1 April 1975, petitioner, purportedly pursuant to G.S. 1A-1, Rule 52(b), filed a motion in the Superior Court "to have the court amend its findings, make additional findings or amend its Decision and Order. . . ." This motion was denied by Judge McKinnon at a hearing on 16 June 1975, and an order denying the motion was signed 27 June 1975. On 24 June 1975, petitioner appealed to this court from the March order and the June order.

Jordan, Morris and Hoke by John R. Jordan, Jr., for petitioner appellant.

Young, Moore and Henderson by Charles H. Young and R. Michael Strickland for respondent appellees.

HEDRICK, Judge.

Petitioner assigns as error the order dated 27 June 1975 denying his "motion to have the court amend its findings, make additional findings or amend its decision and order." G.S. 143-307 and 143-309 (now G.S. 150A-43 and 150A-45, effective 1 February 1976) provide that an aggrieved party may obtain judicial review of a final decision of an administrative board by petitioning for a writ of certiorari to the Superior Court of Wake County.

G.S. 143-314 (now G.S. 150A-50, effective 1 February 1976) provides:

> *Review by court without jury on the record.*—The review of administrative decisions under this Chapter shall be conducted by the court without a jury. The court shall hear oral arguments and receive written briefs, but shall take no evidence not offered at the hearing; except that in cases of alleged irregularities in procedure

> before the agency, not shown in the record, testimony thereon may be taken by the court; and except that where no record was made of the administrative proceeding or the record is inadequate, the judge in his discretion may hear the matter de novo.

G.S. 143-315 (now G.S. 150A-51, effective 1 February 1976) provides:

> *Scope of review; power of court in disposing of case.*—The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted;
> or
>
> (6) Arbitrary or capricious.
>
> If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

G.S. 1A-1, Rule 52(a)(1) provides:

Rule 52. Findings by the court.

(a) *Findings.*—

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

Petitioner's motion to amend the judgment specifies that it was made pursuant to Rule 52(b) which provides:

(b) *Amendment.*—Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

When the judge of the superior court sits as an appellate court to review the decision of an administrative agency pursuant to G.S. 143-314 and 315, the judge is not required to make findings of fact and enter a judgment thereon in the same sense as a *trial judge* pursuant to Rule 52(a) and (b). Indeed, pursuant to G.S. 143-315, the authority of the judge is limited to affirming, modifying, reversing or remanding the decision of the administrative agency. In our opinion, Rule 52(b) has no application in this proceeding, and Judge McKinnon was not required to entertain a motion made pursuant thereto. However, we treat the order of 27 June 1975 denying the motion as an order of dismissal and affirm it.

Petitioner assigns as error the order dated 20 March 1975 affirming the decision of the Board of Law Examiners. G.S.

143-316 (now G.S. 150A-52, effective 1 February 1976) in pertinent part provides:

> Any party to the review proceedings, including the agency, may appeal to the appellate division from the final judgment of the superior court under rules of procedure applicable in other civil cases.

G.S. 1-279, applicable to this appeal, provides:

> *When appeal taken.*—The appeal must be taken from a judgment rendered out of session within 10 days after notice thereof, and from a judgment rendered in session within 10 days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required; provided, however, that if any motion permitted by G.S. 1A-1, Rule 59, is timely made or an amendment to or alteration of a judgment is effected by the methods prescribed in that same rule, the appeal need not be taken within the time limits stated above, but the appeal must be taken within 10 days from the signing of the order ruling on such motions or amending or altering the original judgment.

The provisions of this statute are jurisdictional. When the requirements of the statute are not complied with, the appellate court obtains no jurisdiction of an appeal and must dismiss it. *Oliver v. Williams,* 266 N.C. 601, 146 S.E. 2d 648 (1966). In the present proceeding, petitioner did not give notice of appeal from the order entered 20 March 1975 until 24 June 1975. Therefore this court did not obtain jurisdiction to hear the appeal from the order affirming the decision of the Board.

The result is: The appeal from the 20 March 1975 order affirming the decision of the Board is dismissed; the appeal

from the 27 June 1975 order denying the motion filed pursuant to Rule 52(b) is affirmed.

Dismissed in part; Affirmed in part.

Judges BRITT and MARTIN concur.

APPENDIX B

(1)

Constitution of the United States
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

General Statutes of North Carolina

(2)

§ *1-269. Certiorari, recordari, and supersedeas.*—Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed. (1874-5, c. 109; Code, s. 545; Rev., s. 584; C. S., s. 630.)

(3)

§ *1-277. Appeal from superior or district court judge.* (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or in-

volving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1818, c. 962, s. 4, P. R.; C. C. P., s. 299; Code, s. 548; Rev., s. 587; C. S., s. 638; 1967, c. 954, s. 3; 1971, c. 268, s. 10.)

(4)

§ *1-279. When appeal taken.*—The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required. (C. C. P., s. 300; Code, s. 549; 1889, c. 161; Rev., s. 590; C. S., s. 641.)

(5)

§ *1-279. Manner and time for taking appeal in civil action or special proceeding.*—(a) From Judgments and Orders Rendered in Session.—Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by:

(1) Giving oral notice of appeal at trial, or at any hearing of a timely motion under G.S. 1A-1, Rule 59, for a new trial or to alter or amend a judgment,

or under G.S. 1A-1, Rule 50, for judgment notwithstanding the verdict with or without a motion for a new trial; or

(2) Filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c).

(b) From Judgments and Orders Rendered out of Session.—Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c).

(c) Time When Taken by Written Notice.—If not taken by oral notice as provided in subsection (a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subsection, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under G.S. 1A-1, Rule 50(b), for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under G.S. 1A-1, Rule 52(b), to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) a motion under G.S. 1A-1, Rule 59, to alter or amend a judgment; (iv) a motion under G.S. 1A-1, Rule 59, for a new trial. If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) Content and Service of Notice of Appeal.—The content and mode of service of the notice of appeal required by this section are as prescribed by the rules of appellate procedure. (C. C. P., s. 300; Code, s. 549; 1889, c. 161; Rev., s. 590; C. S., s. 641; 1971, c. 381, s. 12; c. 989; 1975, c. 391, s. 3.)

(6)

§ *7A-30. Appeals of right from certain decisions of the Court of Appeals.*—Except as provided in § 7A-28, from any decision of the Court of Appeals rendered in a case

(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or

(2) In which there is a dissent, or

(3) Which involves review of a decision of the North Carolina Utilities Commission in a general rate-making case, an appeal lies of right to the Supreme Court. (1967, c. 108, s. 1.)

(7)

§ *84-2.1. "Practice law" defined.*—The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel, or otherwise in any such legal work, and to advise or give opinion upon the legal rights

of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition. (C. C. P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C. S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1945, c. 468.)

North Carolina Rules of Civil Procedure (G.S. 1A-1)

(8)

Rule 52. Findings by the court.

(a) *Findings.*—

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested by a party and as provided by Rule 41 (b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

(b) *Amendment.*—Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

(c) *Review on appeal.*—When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings. (1967, c. 954, s. 1; 1969, c. 895, s. 12.)

North Carolina Rules of Appellate Procedure

(9)

Rule 3

Appeal in Civil Cases — How and When Taken

(a) *From Judgments and Orders Rendered in Session.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by

(1) giving oral notice of appeal at trial, or at any hearing of a timely motion under Rule 59 of the Rules of Civil Procedure for a new trial or to alter or amend a judgment, or under Rule 50 of the Rules of Civil Procedure for judgment notwithstanding the verdict with or without a motion for a new trial; or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *From Judgments and Orders Rendered Out of Session.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(c) *Time When Taken by Written Notice.* If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under Rule 50(b) for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) a motion under Rule 59 to alter or amend a judgment; (iv) a motion under Rule 59 for a new trial. If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivisions (a)(2) and (b) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(10)

Rule 14

Appeals of Right from Court of Appeals to Supreme Court Under G.S. § 7A-30

(a) *Notice of Appeal; Filing and Service.* Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right may be filed with or contained in the notice of appeal.

(b) *Same; Content.*

(1) *Appeal Not Presenting Constitutional Question.* In an appeal which is not asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall

specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken and shall state the basis upon which it is asserted that appeal of right under G.S. § 7A-30.

(2) *Appeal Presenting Constitutional Question.* In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall contain the elements specified in Rule 14(b)(1) and in addition shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) *Record on Appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Transmission; Docketing; Copies.* Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) *Briefs.*

(1) *Filing and Service; Copies.* Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought. Within 15 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party shall pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(2) *Failure to File or Serve.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Rule 16

Scope of Review of Decisions of Court of Appeals

(a) *How Determined.* Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal

of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court. No assignments or cross-assignments of error to the decision of the Court of Appeals are required as the basis for the presentation of questions for review by the Supreme Court. A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals nor to those questions upon whose existence the appeal of right or the discretionary review is based. A party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court may present in his brief any questions going to the basis of the Court of Appeals' decision by which he is aggrieved, and any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals. A party who was an appellee in the Court of Appeals and is an appellee in the Supreme Court may present any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals.

(b) *Appellant, Appellee Defined.* As used in this Rule 16, the terms *appellant* and *appellee* have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, *appellant* means the petitioner, *appellee* means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, *appellant* means the party aggrieved by the decision of the Court of Appeals; *appellee,* the oppos-

ing party. Provided, that in its order of certification the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 16.

Rules Governing Admission to the Practice of Law in North Carolina

(12)

Rule VII

Requirements for Comity Applicants

Section 1. Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application, may be certified (licensed) by the Board to practice law in the State of North Carolina, without written examination, in the discretion of the Board, provided each such applicant shall:

(1) Be a citizen of the United States;

(2) File written application with the Secretary, upon such form as may be prescribed by the Board, not less than six (6) months before the application shall be considered by the Board.

(3) Pay to the Board with each written application a fee of $250.00, not more than $125.00 of which may be refunded to the applicant in the discretion of the Board if admission to practice law in the State of North Carolina is denied;

(4) Be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of at least sixty (60) days immediately prior to the

consideration of his application to practice law in the State of North Carolina.

(5) Prove to the satisfaction of the Board:

a. That the applicant is licensed to practice law in a State having comity with North Carolina.

b. That the applicant has been actively and substantially engaged for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the Secretary in:

i. The practice of law as defined by G.S. 84-2.1, or

ii. Activities which would constitute the practice of law if done for the general public, or

iii. Serving as a Judge of a court of record, or

iv. Serving as a full time teacher in a law school approved by the Council of The North Carolina State Bar.

Time spent in active military service of the United States, not to exceed three (3) years, may be excluded in computing the five (5) year period referred to hereinabove;

(6) Satisfy the Board that the State in which the applicant is licensed and from which he seeks comity will admit attorneys licensed to practice in the State of North Carolina to the practice of law in such State without written examination.

(7) Be in good professional standing in the State from which he seeks comity.

(8) Furnish to the Board such evidence as may be required to satisfy the Board of his good moral character.

(9) Applicants must meet the educational requirements of Rule IX as hereinafter set out if first licensed to practice law after August 1971.

Section 2. No license shall be issued to any applicant for admission under this Rule VII except at the time of the annual licensing of the general applicants; provided, the Board may at any other time, in its discretion grant an interim permission to such comity applicants to practice law until license shall be issued.

APPENDIX C

(1)

Letter of the Board of Law Examiners Dated March 7, 1973 (R. 21, 22)

Mr. Charles B. Markham
204 N. Dillard Street
Durham, North Carolina

Dear Mr. Markham:

RE: Application for Admission to the North Carolina State Bar by Comity

This is to advise you that the Board of Law Examiners took under consideration your application filed with the Board of Law Examiners requesting admission by comity pursuant to Rule VII, of the Rules and Regulations of the Board of Law Examiners. The Board of Law Examiners, after giving consideration to your application; to the evidence filed by you and the statements made by you to the Board, upon motion duly made and seconded, it was

RESOLVED that the application of Charles Markham filed with the Board of Law Examiners for admission to the Bar of North Carolina by comity and which was considered and heard by the Board at its meeting on March 3, 1973 in the office of the Board of Law Examiners, Justice Building, Raleigh, North Carolina be denied in that he has failed to satisfy RULE VII, Section 1, (5)b, that he has failed to prove to the satisfaction of the Board that he has actively and substantially engaged in the practice of law for three (3) years out of the last five (5) years immediately preceding the filing of his application.

You are notified as to the action of the Board.

Very truly yours,

s/ B. E. JAMES
On Behalf of the Board of Law Examiners

BEJ/hb

(2)

Order of Superior Court of Wake County dated February 14, 1975 (Filed March 25, 1975) (R. 42)

THIS CAUSE coming on to be heard and being heard before the undersigned judge presiding at the February 10, 1975 Civil Session of the General Court of Justice, Superior Court Division, of Wake County, North Carolina upon the petition of Charles B. Markham for a writ of certiorari to bring before the court the record of the proceedings before the Board of Law Examiners of the State of North Carolina and to review the Order of the Board of Law Examiners of the State of North Carolina denying the petitioner Charles B. Markham's application for a license to practice law in the State of North Carolina by comity, and the court, in its discretion, being of the opinion that said petition should be granted so that a review of the record of said proceedings can be held;

NOW, THEREFORE, IT IS ORDERED, in the discretion of the court, that a writ of certiorari issue to bring before this court the record of the proceedings before the Board of Law Examiners of the State of North Carolina

in the matter of Charles B. Markham's application for license to practice law in the State of North Carolina by comity.

This 14 day of February, 1975.

s/ HENRY A. McKINNON, JR.
Judge Presiding

(3)

Decision and Order of the Superior Court of Wake County dated March 20, 1975 (Filed March 25, 1975)

(R. 42, 43)

THIS CAUSE coming on to be heard and being heard before the undersigned judge presiding at the February 10, 1975 Civil Session of the General Court of Justice, Superior Court Division, of Wake County, North Carolina for review of the ruling of the Board of Law Examiners of the State of North Carolina denying the petitioner Charles B. Markham's application for a license to practice law in the State of North Carolina by comity and the court having reviewed the record of the proceedings before the respondent Board of Law Examiners of the State of North Carolina and having considered briefs and oral argument of counsel, the court being of the opinion that the action of the respondent Board of Law Examiners of the State of North Carolina in denying the petitioner Charles B. Markham's application for a license to practice law in the State of North Carolina by comity is in accordance with the law and is supported by competent evidence in the record before the court;

IT IS THEREFORE, ORDERED, that the action of the Board of Law Examiners of the State of North Carolina in denying the application for license to practice law in

the State of North Carolina by comity of petitioner Charles B. Markham be and is hereby affirmed.

This 20 day of March, 1975.

s/ HENRY A. McKINNON, JR.
Judge Presiding

EXCEPTION NO. 1.

(4)

Exceptions and Appeal Entry dated June 24, 1975 (R. 91, 92)

To the foregoing Order of March 20, 1975, affirming the action of the Board of Law Examiners of the State of North Carolina in denying petitioner's application to practice law in the State of North Carolina by comity, petitioner excepts.

THIS IS PETITIONER'S EXCEPTION NO. 1.

To the foregoing Order of June 18, 1975, denying petitioner's motion to amend its Decision and Order of March 20, 1975, and substitute in lieu thereof petitioner's Requested Findings of Fact, Conclusions of Law and Judgment, petitioner excepts.

THIS IS PETITIONER'S EXCEPTION NO. 2.

To the foregoing Order of June 18, 1975, denying petitioner's motion to amend its Decision and Order of March 20, 1975 to reflect the correct interpretation of the phrase "practice law" and direct the respondents to make specific

findings of facts as to petitioner in light of the said interpretation, petitioner excepts.

THIS IS PETITIONER'S EXCEPTION NO. 3.

To the foregoing Order of June 18, 1975, denying petitioner's motion to remand the case to respondent(s): (a) for findings and a determination as to whether petitioner for the requisite period was "actively and substantially engaged in activities which would constitute the practice of law if done for the general public"; or (b) with directions to specify the facts upon which it concluded that petitioner did not satisfy Rule 5(b), petitioner excepts.

THIS IS PETITIONER'S EXCEPTION NO. 4.

In apt time, petitioner gives notice of appeal to the NORTH CAROLINA COURT OF APPEALS. The petitioner is allowed ___ days to make up and serve case on appeal and the respondents are allowed ___ days thereafter to serve countercase or exceptions. Appeal bond set in the amount of $100.00.

This the 24 day of June, 1975.

s/ HENRY A. McKINNON, JR.
Presiding Judge

(5)

Order of Superior Court of Wake County dated June 27, 1975 (Filed June 30, 1975) (R. 91)

THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding at the June 16, 1975 Civil Session of the General Court of Justice, Superior Court Division, of Wake County, North Carolina upon Petitioner's

motion pursuant to Rule 52(b) of the North Carolina Rules of Civil Procedure to amend its findings, make additional findings or amend its decision and order and the Court having considered the Petitioner's motion and proposed Findings of Fact and Conclusions of Law and having heard arguments of counsel, the Court being of the opinion that Findings of Fact as proposed by Petitioner are unnecessary and that the Decision and Order dated March 20, 1975 in this cause should not be altered or amended;

IT IS THEREFORE, ORDERED that the motion of the Petitioner be and is hereby denied.

This 27 day of June, 1975.

s/ HENRY A. McKINNON, JR.
Judge Presiding

EXCEPTIONS NOS. 2, 3 and 4.

(6)

Order of Superior Court of Wake County dated July 9, 1975 (R. 94, 95)

This matter came on to be considered by the undersigned Judge of the Superior Court upon motion filed by the Petitioner in this case.

Respondents being unopposed to Petitioner's motion, this Court finds the following facts:

1. That this case was concluded and final judgment rendered at the First June Session, 1975, of the Superior Court of Wake County, before the Honorable Henry A. McKinnon, Jr., the final order being dated June 27, 1975.

2. That the Petitioner gave notice of appeal, said notice having been signed by Judge McKinnon on June 24, 1975.

3. That the Petitioner in compliance with GS 1-282 served Notice upon the Respondent that he intended to move for an extension of time to serve the case on the Respondents, said Notice having been filed with the Clerk of Superior Court on July 9, 1975.

THEREFORE, IT IS HEREBY ORDERED, in the discretion of the Court pursuant to the provisions of GS 1-282, that good cause exists for an extension of time to serve the record on appeal upon Respondents and that the Petitioner is allowed 30 days from June 27, 1975, in which to serve the case on appeal; thereafter the Respondents are allowed 30 days in which to make up and serve a counter-case.

The Clerk of the Superior Court is directed to forward a copy of this Order to each of the attorneys of record in this case.

This the 9 day of July, 1975.

s/ HENRY A. McKINNON, JR.
Judge Presiding

(7)

Grouping of Exceptions and Assignments of Error to Orders of the Superior Court of Wake County (R. 200-202)

The petitioner-appellant, Charles B. Markham, respectfully groups his exceptions and assigns the same for error as follows:

ASSIGNMENT OF ERROR NO. 1:

That the Court committed error in affirming, by its Decision and Order of March 20, 1975, the action of the

Board of Law Examiners of the State of North Carolina in denying petitioner's application to practice law in the State of North Carolina by comity.

To the Order of March 20, 1975, affirming the action of the Board in denying petitioner's application to practice law in the State of North Carolina by comity, petitioner excepts.

PETITIONER EXCEPTS, AS SET FORTH IN PETITIONER'S EXCEPTION NO. 1 (R pp 43 & 91)

ASSIGNMENT OF ERROR NO. 2:

That the Court committed error in denying petitioner's motion under Rule 52(b) to amend its Decision and Order of March 20, 1975 and substitute in lieu thereof petitioner's Requested Findings of Fact, Conclusions of Law and Judgment.

To the Order of June 18, 1975, signed June 27, 1975, denying petitioner's motion under Rule 52(b), wherein petitioner requested the Court to make findings of fact and conclusions of law requested by the petitioner, the petitioner excepts.

PETITIONER EXCEPTS, AS SET FORTH IN PETITIONER'S EXCEPTION NO. 2 (R pp 91-92)

ASSIGNMENT OF ERROR NO. 3:

That the Court committed error in denying petitioner's motion under Rule 52(b) to amend its Decision and Order of March 20, 1975 to reflect the correct interpretation of the phrase "practice law" and direct the respondents to make specific findings of facts as to petitioner in light of the said interpretation.

To the Order of June 18, 1975, signed June 27, 1975, denying petitioner's motion under Rule 52(b), wherein petitioner requested the Court to set forth the correct interpretation of the phrase "practice law" and direct the respondents to make specific findings of fact as to petitioner in light of the said interpretation, petitioner excepts.

PETITIONER EXCEPTS, AS SET FORTH IN PETITIONER'S EXCEPTION NO. 3 (R pp 91-92)

ASSIGNMENT OF ERROR NO. 4:

That the Court committed error in denying petitioner's motion under Rule 52(b) to amend its Decision and Order of March 20, 1975 and remand the case to respondent(s) (a) for findings and a determination as whether petitioner for the requisite period was "actively and substantially engaged in activities which would constitute the practice of law if done for the general public"; or (b) with directions to specify the facts upon which it concluded that petitioner did not satisfy its rule VII(5)(b),

To the Order of June 18, 1975, signed June 27, 1975, denying petitioner's motion under Rule 52(b) to amend its Decision and Order of March 20, 1975, wherein petitioner requested the Court to remand the case to respondent(s) for findings and a determination as to whether petitioner for the requisite period was "actively and substantially engaged in activities which would constitute the practice of law if done for the general public" or with directions to specify the facts upon which it concluded that petitioner did not satisfy Rule VII 5(b), petitioner excepts.

PETITIONER EXCEPTS, AS SET FORTH IN PETITIONER'S EXCEPTION NO. 4 (R pp 91-92)

(8)

Notice of Appeal to the Supreme Court of
North Carolina Filed May 13, 1976

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

CHARLES B. MARKHAM, *Petitioner*
v.
JAMES B. SWAILS, Chairman, and HORACE E. STACY, JR., EMERSON P. DAMERON, ROBERT C. HOWISON, JR., W. H. MCELWEE, GEORGE H. MCNEILL, FRANCIS I. PARKER, WALTER R. MCGUIRE, ERIC C. MICHAUX, all members of the BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, and the BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, *Respondents*

Court of Appeals
No. 7510SC811

NOTICE OF APPEAL UNDER G.S. 7A-30

CHARLES B. MARKHAM, Petitioner, pursuant to Rule 14 of the North Carolina Rules of Appellate Procedure, hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals, Case No. 7510SC811, opinion filed April 21, 1976, copy of which is annexed hereto as Exhibit A, which judgment was rendered in a case which directly involves a substantial question arising under the Constitution of the United States and of the State of North Carolina, in that Petitioner, a native and resident of the State of North Carolina, applied to the North Carolina Board of Law Examiners, Respondents herein, for admission to the Bar of North Carolina by comity on August 23, 1972; his application was denied on or about March 3, 1973 in a determination in which the Board made no findings of fact purporting to support its determination, and made no determination whatever as to Petitioner's eligibility for admission under its Rule VII, Section 5(b)ii; the Board made its determination without any competent evidence to support its ruling that Petitioner was not eligible under Rule VII, Section 5(b)i; the Board made such determination, ignoring the language of Section 84-2.1 of the General Statutes of North Carolina and pertinent decisions of the Supreme Court of North Carolina, the Supreme Courts of its Sister States, and of the prevailing rules of the District of Columbia, from which Petitioner sought comity and where he had been admitted to practice in 1951.

The said determination of March 3, 1973 was thus clearly unreasonable, arbitrary and capricious and constituted an abuse of discretion vested in the Respondents by the State of North Carolina and thus violated the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19, of the Constitution of the State of North Carolina. By Petition for Certiorari, Petitioner sought and obtained judicial review in which Judge Henry A. McKinnon, Jr., in Wake County Superior Court, on March 20, 1975, affirmed the decision of the Board of Law Examiners, *inter alia,* without ruling on Petitioner's eligibility under the aforesaid Rule VII, Section 5(b)ii, an issue specifically raised in the petition. The said refusal or unwillingness to pass on this question deprived the Petitioner, as any other litigant, to the right to a judicial determination of an issue properly raised and constituted a further deprivation of his Constitutional right to due process of law and observance of "the law of the land." Petitioner thereupon timely moved to have the Court amend its judgment, raising specifically this issue and also specifically asking the Court to make findings of fact based on the evidence in the record. The Court denied this motion on June 18, 1975 (although in the case of *In re Willis,* 286 N.C. 207, approximately one year before, Judge McKinnon had made

"detailed findings of fact" in upholding the Board's determination in the case of another applicant in a similar hearing; the failure of the Board and Judge McKinnon to treat Petitioner similarly to Willis constituted a further Constitutional transgression, under the equal protection clause of the Fourteenth Amendment).

Petitioner filed timely Notice of Appeal to the Court of Appeals, raising the issues described above (except as to the "equal protection" violation) and in its decision of April 21, 1975, the Court—relying on an erroneous premise directly in conflict with a decision of the Supreme Court of North Carolina[1]—ruled that it was without jurisdiction to hear Petitioner's appeal.

The said decision, denying Petitioner any further judicial review of the determinations of the Board and of Judge McKinnon, represented a still further denial of due process of law under the Fourteenth Amendment and a further violation of Article I, Section 19, of the Constitution of North Carolina, in that Petitioner has not only been denied the opportunity to practice law in his native state in accordance with the rules promulgated under the aegis of this Court, but has, unless he obtains the relief sought herein, been denied even a further judicial determination of the serious and substantial issues involved, timely and properly raised both in his Petition for Certiorari in the Superior Court of Wake County and in his appeal to the Court of Appeals.

(Signatures and Verification, etc. were contained at the end of the Petition for Discretionary Review, etc., simultaneously filed but not printed herein.)

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[1] See Petitioner's Petition for Discretionary Review filed simultaneously herewith.

(9)

Judgment of the Supreme Court of North Carolina
entered June 17, 1976

No. 161 PC — TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1976

CHARLES B. MARKHAM
v.
JAMES B. SWAILS, Chairman, et al

JUDGMENT DISMISSING APPEAL AND ORDER DENYING PETITIONS FOR DISCRETIONARY REVIEW

(7510SC811)

This matter came on to be considered upon petition for discretionary review under G.S. 7A-31 on the 17th day of June 1976, by the Chief Justice and Associate Justices of the Supreme Court of North Carolina, to whom it appeared that the petition for discretionary review should be denied and that the appeal be dismissed *ex mero motu.*

NOW, THEREFORE, it is ordered accordingly that the petition for discretionary review be denied and that the appeal be dismissed as aforesaid and certified to the Clerk of the North Carolina Court of Appeals; whereupon, it is considered and adjudged that the plaintiff do pay the costs incurred, to wit: the sum of Nine ($9.00) Dollars and No/100, and execution issue therefor.

Witness my hand and the seal of the Supreme Court, this 17th day of June, 1976.

ADRIAN J. NEWTON,
Clerk of the Supreme Court of
North Carolina

By: John R. Morgan,
Assistant Clerk

(10)

Order of the Supreme Court of North Carolina
entered July 14, 1976

No. 161PC — TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1976

CHARLES B. MARKHAM
v.
JAMES B. SWAILS,
Chairman, et al

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(7510SC811)

This cause came on to be considered upon the petition of the plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals; upon consideration whereof, it is adjudged by the Court here, that the petition be denied and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed;

Witness my hand and the seal of the Supreme Court, this 14th day of July 1976.

ADRIAN J. NEWTON,
Clerk of the Supreme Court of
North Carolina